

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

Summons for Judgment No.166 of 2004

in

Summary Suit No. 3771 of 2003

Kotak Mahindra Priumus ... Plaintiffs

vs

Millennium Automotive Pvt Ltd ...Defendants

Mr.Cyrus Ardeshir i/b M/s Madekar and Co for
plaintiffs

Ms Rubia Raneja i/b J Narula and Associates for
defendants

CORAM: S.J.VAZIFDAR J.

Dated 25.1.2005

P.C:

1. The suit is filed on a guarantee issued by defendant no. 2 in favour of the plaintiff guaranteeing to repay the loan issued by the plaintiff to defendant no.1 to the extent of Rs.50 lacs together with interest and other moneys in terms of the Dealer Finance Agreement dated 8th March 2001. That the guarantee was executed is an admitted fact. That the amounts are due and payable by defendant no.1 to the plaintiff is also admitted.

2. The affidavit in reply was filed today. The plaintiff is permitted to proceed on the basis of denials. This summons for judgement is directed against defendant no. 2 only.

3. The first defence is that the management of defendant no.1 changed in June 2002. This, however, does not discharge the suit guarantee. It is not even the case of the defendant that the plaintiff agreed to discharge defendant no. 2 as a guarantor in view of the change in the management.

4. The next defence is that the plaintiff has stated in para 12 of the plaint that it waived the security provided in the Dealer Finance Agreement. The said para has to be read as a whole. The sentence preceding this statement states that there are no hypothecated assets to be found in existence. It is not a case where the plaintiff has given up any security which is actually in existence. Secondly clauses 2 and 3 of the guarantee "Exh F to the plaint" are an answer to this defence. Clauses 2 and 3 of the said guarantee read as under:

"2. The liability of the Guarantor under this Deed of Guarantee shall be that of a principal debtor and not merely as a surety and such liability shall not be impaired or discharged by reason of any time given or forbearance on the part of the Principal or

any indulgence shown in repayment of the loan amount or the Principal failing to enforce its other remedies to recover the said loan together with interest and other monies.

3. The Principal shall have the fullest liberty without in any way affecting this Guarantee and without discharging the Guarantor from his liability hereunder to postpone for any time or from time to time the exercise of any of the powers conferred under the said Agreement and/or to vary any of the terms thereof or any document/instrument connected with the said loan by any document that may have been or that may hereafter be executed by the Borrower and exercise the same at any time and in any manner and either to enforce or forbear to enforce the covenants for payment contained in or implied by the said Agreement or any document or any other remedies or securities available to the Principal, or to grant any indulgence or facility to the Borrower and the Guarantor shall not be released and/or discharged by any exercise by the Principal of this liberty with reference to the

matters aforesaid or any of them or by reason of time being given to the Borrower or of any other forbearance, act or omission on the part of the Principal or any other indulgence by the Principal to the Borrower or by any other matter or thing whatsoever which under the law relating to sureties would but for this provision have the effect of so releasing the Guarantor and the Guarantor hereby consents to all variations that may be made and the Guarantor also hereby waives all suretyship and other rights which the Guarantor might otherwise be entitled to enforce."

5. In the circumstances conditional leave to defend is granted to the defendant on deposit of Rs.50 lacs on or before 20th June 2005.